

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

William Younger Guess,

Petitioner

NOTICE OF APPEAL

v.

United States Patent and Trademark Office
Respondent

To Director of the U.S. Patent and Trademark Office
Office of the Solicitor
Mail Stop 8
Alexandria, VA 22313-1450

Clerk
United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
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Notice is given that Petitioner, William Younger Guess, hereby appeals to the
United States Court of Appeals for the Federal Circuit from the October 27, 2009
Decision of the United States Patent and Trademark Office Board of Appeals and
Interferences with respect to Appeal No 2009-004446 and Application No. 09/964,000.

Three copies of this Notice of Appeal, along with a docketing fee of \$450.00 will be served on the Clerk for the United States Court of Appeals for the Federal Circuit.

Respectfully Submitted

 Dec. 22, 2009

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10/27/2009

EXAMINER

BECKER, DREW E

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PAPER

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The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte WILLIAM YOUNGER GUESS

Appeal 2009-004446
Application 09/964,000
Technology Center 1700

Decided: October 27, 2009

Before EDWARD C. KIMLIN, BRADLEY R. GARRIS, and
ADRIENE LEPIANE HANLON, *Administrative Patent Judges*.

KIMLIN, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 22-46. We have jurisdiction under 35 U.S.C. § 6(b).

Claim 22 is illustrative:

22. In a food item of the type in which a muscle tissue elongate contains an edible filling disposed along the longitudinal axis thereof characterized in that said edible filling is comprised of an animal tissue elongate having a dominant proportion of water and protein respectively;

whereby a coaxially combined food item is produced which when sliced transversely will reveal a substantially concentric arrangement comprising an outer ring, a center, and a boundary therebetween, in which said boundary may or may not be highly visible depending on the visual similarity of the make up of the constituent elongates.

In addition to the admitted prior art (APA) found at pages 1-3 of Appellant's Specification, the Examiner relies upon the following references in the rejection of the appealed claims (Ans. 5):

Bemis	1,897,189	Feb. 14, 1933
Lovell	3,615,692	Oct. 26, 1971
Huling	6,117,467	Sep. 12, 2000
Haig	6,582,741 B2	Jun. 24, 2003
Holbrook	6,599,545 B1	Jul. 29, 2003

Giuliano Bugialli, *Giuliano Bugialli's Classic Techniques of Italian Cooking* 285-287 (Fireside, 1989).

Appellant's claimed invention is directed to a food item wherein an edible filling is disposed along the longitudinal axis of a muscle tissue elongate. When the coaxially combined food item is sliced transversely, a concentric arrangement comprising an outer ring, a center, and a boundary therebetween is revealed. Some of the appealed claims recite that the food item comprises a means for highlighting the boundary between the outer ring and the center, and that the highlighting means is a green vegetable material.

Appealed claims 22-46 stand rejected under 35 U.S.C. § 112, first paragraph, written description requirement. Claims 22-29, 31-33, 36-39, 41-

43, and 45-46 stand rejected under 35 U.S.C. § 112, second paragraph as being indefinite. The prior art rejections of the appealed claims are as follows:

- (a) claims 22, 23, 30, 31, 35, 36, 40, 41, 44, 45 under 35 U.S.C. § 102(b) over Lovell,
- (b) claims 22, 24, 30, 31, 35, 36, 40, 41, 44, 45 under 35 U.S.C. § 102(e) over Holbrook,
- (c) claims 31 under 35 U.S.C. § 102(e) over Haig,
- (d) claims 22, 24, 30, 40, 41, 44, 45 under 35 U.S.C. § 103(a) over Haig in view of Huling,
- (e) claims 26-29, 42, and 43 under 35 U.S.C. § 103(a) over Haig in view of Huling and the APA,
- (f) claims 23 and 25 over Haig in view of Huling and Bugialli,
- (g) claims 32-34 over Haig in view of Bemis, and
- (h) claims 37-39 and 46 over Holbrook in view of Bemis.

We consider first the Examiner's rejection under 35 U.S.C. § 112, first paragraph, written description requirement. It is well settled that the Specification, in order to comply with § 112, first paragraph, must reasonably convey to one of ordinary skill in the art that, at the time of filing the application, the inventor had possession of the claimed subject matter. *In re Edwards*, 568 F.2d 1349, 1351-52 (CCPA 1978). According to the Examiner, Appellant's original Specification does not provide written descriptive support for the claim 22 recitation "a dominant proportion of water and protein", for the claim 30 recitation "a weight of at least 7%", the claim 35 recitation "a weight of at least 10%", the recitation "means for

highlighting” in claims 24, 31, 32, 36, 37, 41, 45, and 46, and the “non-pork muscle tissue” recitation in claims 40 and 44.

We agree with the Examiner that the claim language “a dominant proportion of water and protein” to describe the edible filling in claim 22 lacks written descriptive support. While Appellant cites the reference “The Meat We Eat” to demonstrate that lean muscle consists of approximately 20% protein and 70% water, the Examiner correctly points out that the language “dominant proportion” includes an amount of water and protein greater than 50%. Since Appellant’s Specification does not define the term “dominant proportion”, and does not disclose the percentages of water and protein for the edible filling, we find no error in the Examiner’s reasoning. Likewise, we agree with the Examiner that there is no original descriptive support for the claim 30 recitation that the second animal tissue elongate has a weight of at least 7% of the first animal tissue elongate, and the claim 35 recitation reciting that the second elongate has a weight of at least 10% of the first elongate. Contrary to Appellant’s argument, Appellant has not demonstrated that a disclosure of a top loin and a tenderloin provides descriptive support for the claimed ranges.

We disagree with the Examiner that the original Specification does not provide descriptive support for the claimed “means for highlighting”. Appellant’s Specification, at paragraphs [30] and [31] and the accompanying figures, describes a means for highlighting a boundary between the center and the outer ring, namely, a green vegetable material. Therefore, we will not sustain this rejection of claims 31-34.

We also find no original descriptive support for the language of claims 40 and 44 reciting “non-pork muscle tissue” and “non-pork animal

tissue”, respectively. As pointed out by the Examiner, the portion of Appellant’s Specification describing the claimed invention generally refers to meat, and does not convey to one of ordinary skill in the art that Appellant intended to exclude pork. *See Ex Parte Grasselli*, 231 USPQ 393 (BPAI 1983).

Therefore, we affirm the Examiner’s § 112, first paragraph, rejection of claims 22-30 and 35-46, but not the rejection of claims 31-34.

We next consider the Examiner’s rejection under § 112, second paragraph. We will not sustain the Examiner’s rejection based on the claim 22 recitation “a dominant proportion of water and protein”, which defines the animal tissue elongate comprising the edible filler. The Examiner has acknowledged that such language defines an amount of water and protein exceeding 50%, and the Examiner has not demonstrated that one of ordinary skill in the art would have difficulty in ascertaining the particular type of meat that may constitute an edible filling within the scope of the claim. *See In re Sneed*, 710 F.2d 1544, 1548 (Fed. Cir. 1983). Also, the skilled artisan would understand the “means for highlighting” to be the green vegetable material depicted as 18 in Appellant’s drawings

We now turn to the Examiner’s prior art rejections. We will sustain the Examiner’s § 102 rejection over Lovell. We agree with the Examiner’s finding that Lovell describes a food item comprising a first elongate muscle and a second elongate muscle mass which provides a boundary and, therefore, highlight means, with the first muscle mass (*see* Figs. 2 and 4). While Appellant maintains that Lovell discloses a viscous stuffing and not an animal tissue elongate disposed within the chicken leg quarter, we concur with the Examiner that the present Specification does not define “muscle

tissue elongate” in any such way that provides a distinction over the meat filling of the reference. The Examiner correctly points out that the claim language does not require a whole, intact muscle. Also, Appellant acknowledges that the transition, or boundary, between the leg tissues and meat filling of Lovell would be discernable and, therefore, we do not understand Appellant’s argument regarding how such a boundary would not perform the claimed function of highlighting.

We will not sustain the Examiner’s §102 rejection over Holbrook. Although Holbrook is primarily directed to making a sandwich, the Examiner relies upon the reference disclosure of a first food stuff enclosing a second tubular food stuff “wherein both food stuffs can be meat (column 3, lines 9-15)” (Ans. 14, second para.). However, we do not find sufficient specificity in the reference’s broad disclosure to constitute a description of the claimed muscle tissue elongate containing an animal tissue elongate filling within the meaning of §102. In relevant part, Holbrook discloses “[t]he term ‘food stuff’ is used broadly herein to refer to edible substances, including for example, bread, buns, meat, cheese, fruits, vegetables, tomatoes, lettuce, onions, condiments, etc.” (col. 3, ll. 13-15). Hence, it can be seen that too high a degree of selection is required to arrive at both the filler and the shell comprising meat, and the reference provides no particular direction to make such selections.

We find no error in the Examiner’s § 102 rejection of claim 31 over Haig. Appellant does not dispute the Examiner’s finding that Haig describes a food comprising a first elongate food mass in the form of a pork loin with a filling therein. Appellant maintains that “[n]owhere in the Haig disclosure is there any teaching or suggestion that an animal tissue elongate be inserted

by this device [or method] into the incised pork loin” (Br. sentence bridging 12-13). However, as correctly pointed out by the Examiner, claim 31 does not require that the edible filling be meat. We also find no error in the Examiner’s finding that “Haig clearly illustrates a boundary between the pork loin and its stuffing in Figure 1” (Ans. 15, second para.).

We will also sustain the Examiner’s § 103 rejections based on Haig as a primary reference for the reasons set forth in the Examiner’s Answer. In essence, we fully concur with the Examiner that it would have been obvious for one of ordinary skill in the art to select the meat filling of Huling for the food stuffing in Haig’s food item. As explained by the Examiner, both Haig and Huling are directed to meat products and Huling evidences that it was common in the art to stuff meat with other meat. We do not agree with Appellant that “[t]he material to be stuffed regarding the Huling disclosure is vague” (Br. 14, first para.). We find nothing vague in the reference disclosure that it was known in the art to use other meats for stuffing, such as mixed sausage stuffed into a roast. We further find no error in the Examiner’s legal conclusion that it would have been obvious for one of ordinary skill in the art to slice the food item of Haig, as modified with the meat filling of Huling, into steaks either before or after the food is cooked. It can hardly be gainsaid that it was well known in the art to slice elongated meat products into individual steaks.

We further concur with the Examiner with respect to the rejection of claims 32-34 that it would have been obvious for one of ordinary skill in the art, based on the combined teachings of Haig and Bemis, to wrap the filling of Haig with the lettuce of Bemis to provide “an efficient and convenient means for holding the particulate stuffing of Haig together prior to and

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during insertion” (Ans. 10, first para.). As noted by the Examiner, Haig teaches that the filling may include vegetables. We do not subscribe to Appellant’s argument that Haig and Bemis are non-analogous art inasmuch as both references are directed to stuffed food products, and it was notoriously well known in the art to wrap food with lettuce.

Appellant does not present a substantive argument against the § 103 rejection of claims 37-39 and 46 over Holbrook in view of Bemis. Accordingly, we will summarily affirm this rejection.

As a final point, we note that Appellant bases no argument upon objective evidence of non-obviousness, such as unexpected results.

In conclusion, based on the foregoing, the Examiner’s decision rejecting the appealed claims is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a) (2008).

AFFIRMED

ssl

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